

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**ROMONTE D THOMAS**  
Claimant

**APPEAL NO. 10A-UI-15581-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCED SERVCIES**  
Employer

**OC: 08/15/10**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayments

**STATEMENT OF THE CASE:**

Advanced Services filed an appeal from a representative's decision dated November 2, 2010, reference 02, which held that no disqualification would be imposed regarding Romonte Thomas' separation from employment. After due notice was issued, a hearing was held by telephone on January 5, 2011. Mr. Thomas participated personally. The employer participated by Anthony Hinman, Owner.

**ISSUE:**

At issue in this matter is whether Mr. Thomas was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Thomas' second period of employment with Advanced Services began on October 27, 2009. He worked full-time as a laborer. He was discharged because of his attendance.

Mr. Thomas was absent without calling in on January 4, 2010. He had a meeting with his parole officer on January 5 and usually reported to work after the meeting. He failed to report for work or contact the employer after his meeting on January 5. He called on February 19 to report that he was running late and would be dropped off at the job site. However, he did not report for work or re-contact the employer regarding his intentions. Mr. Thomas was verbally warned after each incident of failing to report. The decision to discharge was based on the fact that he was absent without calling in on March 19 and again on March 20. He was notified of his discharge on March 20. Attendance was the sole reason for the separation.

Mr. Thomas filed a claim for job insurance benefits effective August 16, 2009. He filed an additional claim effective February 28, 2010. From March 21 through July 10, 2010, he received a total of \$4,289.71. He filed a claim for extended benefits effective July 11, 2010, and received a total of \$1,490.00 in benefits. Mr. Thomas filed his current claim effective August 15, 2010 and has received a total of \$2,409.93 in benefits. He has received a total of \$8,189.64 in unemployment benefits since his separation from Advanced Services.

**REASONING AND CONCLUSIONS OF LAW:**

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

Mr. Thomas was absent without calling in on at least five occasions during a period of approximately three months. He knew he was required to call if he was going to be absent and always had access to a telephone and the ability to call. The fact that he failed to call the employer makes the absences unexcused, regardless of the reasons for them. He was verbally warned that his job was in jeopardy. In spite of the warnings, he continued to miss work without notice to the employer. An employer is hampered in its ability to plan and allocate work if it does not know from day to day which employees are going to appear for work.

The administrative law judge considers five unexcused absences over a period of three months to be excessive, especially in light of warnings and the failure to give notice of the absences. Excessive unexcused absenteeism constitutes a substantial disregard of the standards an employer has the right to expect. It is, therefore, misconduct within the meaning of the law. The employer in this matter has satisfied its burden of proving disqualifying misconduct. For the above reasons, Mr. Thomas is not entitled to job insurance benefits.

Mr. Thomas has received benefits since filing an additional claim effective February 28, 2010. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

**DECISION:**

The representative's decision dated November 2, 2010, reference 02, is hereby reversed. Mr. Thomas was discharged by Advanced Services on March 20, 2010 for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Thomas will be required to repay benefits.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/kjw